Antelope Valley Press *and* Bakersfield Typographical Union No. 439, Communications Workers of America. Case 31–CA–18236

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

This case presents the issue of whether the Respondent's proposed contract changes over which it bargained to impasse and then implemented unilaterally involved a mandatory or permissive subject of bargaining.

The Board has considered the decision in light of the exceptions, briefs and oral argument and has decided to affirm the judge's rulings, findings, and conclusions for the reasons set forth in this decision.[1]

I. RELEVANT FACTUAL FINDINGS

The Respondent is engaged in the publication of a newspaper in Palmdale, California. The Union and the Respondent have been parties to successive collective-bargaining agreements for certain Palmdale employees for about 30 years. The most recent contract was effective from January 1, 1987, to December 31, 1988. This agreement stated, in relevant part:

> Section 1: The Employer hereby recognizes the Union as the exclusive bargaining representative of all employees covered by this Agreement. The words ''employee'' and ''employees'' when used in this contract apply to journeymen and apprentices.
>
> Section 3(a): Jurisdiction of the Union, except as noted otherwise in this memorandum, begins with the markup of copy and continues until the newspaper clears the folder and the gross Urbanite Press and the appropriate collective bargaining unit consists of all employees performing any such work.

The printing of the paper, including composition, camera, plate making, and the press, is performed in Palmdale, where about 38 employees work in the production department. Approximately 8–10 of these employees work in display advertising. The Respondent also employs 42 employees at another facility in Lancaster. These employees are responsible for the preparation of advertising and for editorial functions.

Because of an increase in circulation and advertising, the Respondent introduced new equipment, including McIntosh computers, to enable it to meet its increased production requirements. The introduction of the new computers motivated it to make the proposals at issue.

From December 1988 until February 1990,[2] the Union and the Respondent attempted to negotiate a new collective-bargaining agreement. The Respondent initially proposed a change in section 3(a). As modified, the clause would begin as follows: ''Jurisdiction of the Union, except as noted otherwise in this memorandum, will encompass work not prepared on VDTs outside the composing room [and continues tracking the prior language].'' Although the Union did not object to the Respondent's decision to introduce new computer equipment, it was concerned that the Respondent's proposal would result in the removal of work from the unit.

As the parties were unable to reach a new agreement, the later bargaining sessions were held in the presence of a mediator. During this time, several proposals were exchanged between the parties. On December 15, 1989, the Respondent proposed a contract which included sections 1 and 3(a) of the 1987 agreement. However, it also included the following language:

> Notwithstanding any other provision in this agreement, the Employer reserves the right to assign the following work to persons outside the bargaining unit:
>
> 1) Electronic markup of display and classified advertising matter;
> 2) Inputting of text and graphics into electronic systems for display and classified advertising matter; and
> 3) Electronic make-up of display and classified matter.

The Union rejected this offer, and insisted that sections 1 and 3(a) of the expired contract be continued without additions. On February 12, the Respondent made its final offer, which included the above language. The Respondent's last offer also included language designed to assure the Union that, from the date of signing until December 31, 1991, no full-time employee would be laid off as a result of the introduction of the new equipment.

The Respondent implemented its final proposal on February 19. Since then, it has used its McIntosh com-

[1] On November 15, 1991, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel and the Charging Party each filed exceptions and supporting briefs. The Respondent filed cross-exceptions, and a supporting brief. The Charging Party filed a reply brief to the Respondent's exceptions.

On August 5, 1992, the Board scheduled oral argument in this case and in *Bremerton Sun Publishing Co.*, 311 NLRB 467, because of the importance of the issues presented. The American Federation of Labor and Congress of Industrial Organizations and the Newspaper Association of America filed separate amicus briefs. On September 10, 1992, the General Counsel, Charging Party, and the Respondent presented oral argument before the Board.

[2] All dates hereafter refer to 1990 unless otherwise stated.

puters to prepare and electronically mark up display advertising. As a result, some unit work is being performed by employees at Lancaster, and some is performed by employees in the creative services department at Palmdale. It is undisputed that no bargaining unit employees have lost their jobs due to the equipment purchase or the Respondent's implementation of its final offer.

II. JUDGE'S DECISION AND CONTENTIONS OF PARTIES BEFORE THE BOARD

The judge found, based on *Storer Communications*, 295 NLRB 72 (1989), enfd. sub nom. *Stage Employees IATSE Local 666 v. NLRB*, 904 F.2d 47 (D.C. Cir. 1990), that the Respondent's proposal involved only work assignments, rather than the scope of the bargaining unit. In reviewing the Respondent's proposal, the judge determined that it merely sought to ''carve out work assignment exceptions to the jurisdictional aspect of the clause'' and was not intended to change the unit description. He also relied on the fact that the proposal and implementation resulted in no layoffs or terminations of unit employees. The judge concluded that the Respondent's proposal was a mandatory subject of bargaining, that Respondent was entitled to insist to impasse on the proposal, and that because impasse was reached, the implementation was lawful.

In oral argument before the Board, the General Counsel and the Charging Party contend that the Respondent's proposal redefined the scope of the unit and was therefore not a mandatory subject. In this regard, they note that the proposal ''reserves the right to assign the following work to persons outside the bargaining unit.'' The General Counsel and Charging Party argue that it was unlawful for the Respondent to bargain to impasse over this contract clause. The General Counsel further maintains that, if an employer has previously agreed to a clause which describes the unit in terms of work performed, that employer should be barred from later adding provisions that permit a reassignment of work to nonunit employees, even if there is an introduction of new technology.

The Respondent contends that the contract proposal was a mandatory subject of bargaining because it did not alter the scope of the unit. In support of this position, the Respondent maintains that the implementation of its contract proposal did not take any employee out of the unit and did not result in any loss of jobs for unit employees. In Respondent's view, the new clause was necessary to provide the flexibility to operate its new equipment in an economic and efficient manner. The Respondent maintains that it simply implemented, after impasse, a mandatory bargaining proposal to transfer work outside the unit.

III. ANALYSIS

We make the following general observations concerning bargaining obligations to the extent relevant to our decision here. Section 8(d) of the Act defines the scope of the duty to bargain collectively as encompassing ''wages, hours, and other terms and conditions of employment.'' Those are the mandatory subjects of bargaining—the ones over which a party must bargain if requested to by the other party. But, because Section 8(d) also provides that one party need not agree to the other's proposal or make a concession, either party may lawfully bargain to impasse over a mandatory bargaining subject.[3]

''Permissive'' subjects of bargaining are those not involving wages, hours, or other terms and conditions of employment. Parties may bargain over those subjects if they choose to do so. Because neither party is required to bargain at all over a permissive subject, a party may not lawfully bargain to impasse over a permissive subject.[4]

The assignment of work affects terms and conditions of employment, and therefore is a mandatory bargaining subject; accordingly, an employer normally may lawfully insist to impasse over a change in work assignments, even if it entails transferring work out of the bargaining unit.[5] The scope of the unit itself, however, does not involve wages, hours, or other terms and conditions of employment, and therefore is a permissive subject. Thus, neither party may bargain to impasse over a change in the scope of the bargaining unit.[6]

Here, there is no question that the Respondent proposed and insisted to impasse on the inclusion of a contract term allowing it to assign certain specified kinds of work—the computerized markup of advertising material—to persons outside of the bargaining unit, and later did reassign some of that work to employees who formerly were not considered members of the unit. But as in many other bargaining relationships in the printing industry, the parties previously have defined the bargaining unit in terms of work assignments and not in terms of job classifications. Section 3(a) of the parties' 1987 agreement provides that ''the appropriate collective bargaining unit consists of all employees performing any such work,'' i.e., any work in the Union's jurisdiction as defined in Section 3(a). The General Counsel and the Union argue that because the bargaining unit is defined in this fashion, any assign-

[3] See, e.g., *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958).

[4] Id.

[5] See *Storer Communications*, above, 295 NLRB at 78, citing *Fibreboard Paper Products Co. v. NLRB*, 379 U.S. 203 (1964).

[6] See, e.g., *Idaho Statesman*, 281 NLRB 272, 276 (1986), enfd. 836 F.2d 1396 (D.C. Cir. 1988). As the court stated in *Douds v. Longshoremen ILA*, 241 F.2d 278, 282 (2d Cir. 1957), ''Parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining.''

ment of work to employees outside the unit necessarily changes the scope of the unit. They also argue that the Respondent's December 15, 1989 proposal gives the Respondent unilateral discretion to change the unit at will. Consequently, the General Counsel and the Union contend that the Respondent insisted to impasse over, and implemented, a change in the scope of the unit—a permissive subject—in violation of Section 8(a)(5).

Their argument has initial appeal. Indeed, as the judge remarked, ''In the instant case, the bargaining unit is defined in terms of work and, thus, the question becomes difficult because any proposal relating to work assignments affects the scope of the bargaining unit.'' However, their position conflicts with the otherwise settled principle that employers may lawfully bargain to impasse over, and then implement, changes in work assignments. And that, aside from the question of the effect on unit scope, is exactly what the Respondent did in this case. Were we to hold that because of the way the unit is described in the contract, the Respondent may not lawfully assign work outside of the unit without the Union's permission, we would in effect lock the Respondent into a pattern of work assignments that might make no sense in the light of changing technology in the workplace.

This tension between unit scope and the introduction of new technology is a recurrent one, especially in the printing industry. Heretofore, we have attempted to resolve the issue by determining whether the contract proposal insisted on by the employer was a unit description or a work assignment provision.[7] Because such proposals, including the one at issue in this case, have aspects of both kinds of provisions, we have decided to abandon the ''either/or'' semantic debate in favor of an approach that will better enable us to resolve these matters while recognizing and accommodating the legitimate concerns of the parties.

The Union is understandably concerned that any modification of Section 3(a) will change the description of the unit. As we have stated, a union is entitled to take the unit description as given; it cannot be forced to bargain about the unit description, and it need not tolerate any effort by the Respondent to alter the description of the unit. On the other hand, the Respondent does not want Section 3(a) to be rigidly construed to preclude the transfer of work to employees not now in the unit, even if the Respondent offers to bargain over such a transfer. As we have emphasized, that is normally an employer's privilege, and were the Respondent precluded from exercising that privilege, it might be frozen into an outmoded pattern of work assignments potentially impeding its ability to compete in the marketplace.

To the extent possible, we wish to accommodate both parties' interests and focus on the crux of the problem, namely, the unit placement of the employees to whom unit work is to be assigned. Thus, in determining whether an employer's contract proposal is lawful, we shall first look to see whether the employer has insisted on a change in the unit description. In accord with long-established precedent, we shall continue to find any such insistence to be unlawful, even if the unit is described in terms of work performed. The union is the representative of the employees who currently perform the work. A proposal to change the actual unit description clause would raise questions regarding the union's right to represent those employees. The employer consequently may not insist on such a proposal.

If the employer does not insist on changing the unit description, however, but seeks an addition to that clause that would grant it the right to transfer work out of the unit, we will find the employer acted lawfully provided that the addition does not attempt to deprive the union of the right to contend that the persons performing the work after the transfer are to be included in the unit.[8] Under this approach, the employer will be able to act to take advantage of new technology, but will not be able to decide, unilaterally, questions regarding the scope of the unit.

We anticipate that the approach we adopt today will satisfy the needs of both unions and employers. Indeed, at the oral argument, the attorneys for both the Union and the Respondent indicated that a proposal that dealt strictly with work assignments, while leaving questions of unit scope to the Board, to be decided in unit clarification or other proceedings, would be lawful.[9] In its brief, amicus AFL–CIO also indicated that such an approach should be deemed lawful.

Applying this new approach, we find, first, that the Respondent's December 15, 1989 proposal retained the language of the old contract; it did not purport to change the unit description. The proposal gave the Respondent the right to assign work to ''persons outside the bargaining unit.'' We do not read that phrase as

[7] The decisions are not easily reconcilable. Compare, e.g., *Storer Communications*, above, and *Newspaper Printing Corp. (Nashville) v. NLRB*, 692 F.2d 615 (6th Cir. 1982) (employers lawfully bargained to impasse over work assignment provision), with *Newspaper Printing Corp. (Tulsa)*, 232 NLRB 291 (1977), and *Idaho Statesman*, above (employers unlawfully insisted to impasse over modification of unit scope). See also Judge Easterbrook's dissent in *Hill-Rom Co. v. NLRB*, 957 F.2d 454 (7th Cir. 1992), arguing that the court should have affirmed the Board's decision because ''when the same facts can be put in either category with equal plausibility, the distinction collapses. . . . Neither choice can be condemned as wrong, because in rhetorical contests of this variety there is no right or wrong.''

[8] Depending on the circumstances, such a contention could be raised in a unit clarification proceeding or in an 8(a)(5) context.

[9] The parties' attorneys disagreed over whether the phrase ''persons outside the bargaining unit'' necessarily indicated that the proposal would have excluded from the unit all such persons to whom unit work might be assigned. (As we find below, it did not.) Their difference in this regard, however, concerned the appropriate interpretation of the record in this case, not our approach itself.

equivalent to unit exclusion, because the record does not indicate that the Respondent ever insisted during negotiations that the quoted language meant that employees to whom work might be assigned pursuant to the proposal would never be considered members of the unit.[10] Neither the clause itself nor the Respondent's course of dealing with the Union indicates that, under that provision, the Union would be precluded from claiming that the individuals who were assigned those functions should henceforth be included in the unit. Thus, we read the Respondent's proposal as merely indicating that the Respondent would be able to assign specified unit work to individuals who were not previously members of the unit.

To summarize, because the Respondent did not insist on changing the unit description, and because its proposal did not attempt to deny the Union the right to assert that any individuals to whom unit work might be assigned were unit members, we find that the Respondent's impasse proposal was a mandatory subject of bargaining. Accordingly, the Respondent did not violate Section 8(a)(5) and (1) by bargaining to impasse over, and then implementing, its December 15, 1989 proposal.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[10] The Respondent's negotiator's testimony on this point is not necessarily to the contrary. It could be construed as signifying that the purpose of the Respondent's proposal was simply to allow the Respondent to assign the unit work in question to whomever it wanted, including curently represented employees and even newly hired unrepresented employees. But even construing the testimony to mean that the negotiator thought that nonunit employees to whom the work was assigned would remain outside the unit even after the assignment, we still find no violation, because the record does not establish that the Respondent ever communicated such an understanding to the Union during negotiations. Hence, under either construction, the General Counsel has failed to carry his burden of proof here.

Alice Joyce Garfield, for the General Counsel.
Richard Rosenblatt, of Englewood, Colorado, for the Union.
Joseph E. Herman (Seyfarth, Shaw, Fairweather & Geraldson), of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Los Angeles, California, on July 16, 1991. On May 2, 1990, Bakersfield Typographical Union No. 439, Communications Workers of America (the Union) filed the charge alleging that Antelope Valley Press (Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. § 151 et seq., the Act). The charge was amended on July 3, 1990. Thereafter on September 27, 1990, the Regional Director for Region 31 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a California corporation with an office and principal place of business located in Palmdale, California, where it is engaged in the publication of a newspaper. Respondent, in the course and conduct of its business operations, annually derives gross revenues in excess of $200,000. Annually, Respondent purchases and receives goods and products valued in excess of $5000 directly from sellers or suppliers located outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

Respondent publishes a newspaper in Palmdale, California, 5 days per week. It has had a collective-bargaining relationship with the Union for at least 30 years. The most recent collective-bargaining agreement was effective from January 1, 1987, until December 31, 1988. The bargaining unit covered by the 1987 agreement is described as follows:

> Section 1: The Employer hereby recognizes the Union as the exclusive bargaining representative of all employees covered by this Agreement. The words ''employee'' and ''employees'' when used in this contract apply to journeymen and apprentices.
>
> Section 3(a): Jurisdiction of the Union, except as noted otherwise in this memorandum, begins with the markup of copy and continues until the newspaper clears the folder and the gross Urbanite Press and the appropriate collective bargaining unit consists of all employees performing any such work.[1]

Between December 1988 and February 12, 1990, the parties met in 16 bargaining sessions in an unsuccessful attempt to negotiate a new contract. The parties did not reach agreement and the Respondent insisted to impasse on its last offer. On February 19, 1990, Respondent implemented its final offer.

[1] During the relevant time period, there were 30 full-time and between 2 and 5 part-time employees in the bargaining unit.

Within this factual framework, the General Counsel alleges that Respondent unlawfully: (1) bargained to impasse on the definition or scope of the bargaining unit; and (2) on or about February 19, 1990, implemented its last offer to the Union. The General Counsel argues that since Respondent insisted to impasse unlawfully, it follows that no legally cognizable impasse existed.

Respondent admits that it insisted to impasse on its final proposal and that it implemented that proposal after the impasse. Respondent contends that it bargained to impasse over the assignment of work and not the definition or scope of the unit. Further, Respondent contends that the bargaining unit is inappropriate and, therefore, that it cannot be found to have bargained in bad faith.

B. *Facts*

As indicated above, the scope of the unit was defined by the work performed. The work began with the markup of copy and included the setting and building of display advertising and two-column classified advertising, camera work on setting those pages, and any camera work going on to those pages, making of the final negative, making of the plate, and running of the press until it came off the press. When negotiations began in December 1988, Respondent proposed to change the unit description to read ''Jurisdiction of the Union, except as noted otherwise in this memorandum, will encompass work not prepared on VDTs outside the composing room and continues.''

Respondent, then represented by Monty Odett, co-publisher, stated that Respondent wished to put in new equipment and wanted to be able to operate the equipment at its discretion. The Union was not opposed to new equipment but insisted on its people doing the work. Odett stated that Respondent wanted to put 90 percent of the advertisements together on computer terminals. The Union took the position that Respondent's proposal would cause the loss of one-third of the work performed by the unit employees. After eight bargaining sessions, the Union contacted the Federal Mediation and Conciliation Service. The remaining eight bargaining sessions were held in the presence of a Federal mediator.

On June 1, 1989, Doug Cornford, a labor consultant, replaced Odett as Respondent's chief spokesman. Cornford proposed a differently worded unit description. Under Respondent's June 1 proposal, unit-jurisdiction would ''begin with final page preparation.'' The Union found this proposal unacceptable on the ground that its impact would result in the loss of the display advertising work. Between June 30 and December 15, 1989, several proposals were exchanged. On December 15, 1989, Respondent proposed a contract which included the unit-jurisdiction subsection of the 1987 agreement with the addition of the following subsection:

> Notwithstanding any other provision in this agreement, the Employer reserves the right to assign the following work to persons outside the bargaining unit:
>
> 1) Electronic markup of display and classified advertising matter;
>
> 2) Inputting of text and graphics into electronic systems for display and classified advertising matter; and
>
> 3) Electronic make-up (building) of display and classified matter.[2]

The Union again rejected Respondent's proposal and insisted that the unit-jurisdiction provision from the expired contract be continued. On January 31, Respondent gave the Union a complete contract proposal including the unit-jurisdiction proposal of December 15, set forth above. Cornford informed the Union that the January 31 proposal was Respondent's ''best offer'' and that the Respondent would unilaterally implement the proposal absent agreement on a new contract. On February 12, 1990, the parties met again. At this meeting Respondent proposed the following addition to its jurisdiction proposal:

> Effective with the date of signing of this agreement and continuing until December 31, 1991, no employee covered by the terms of this agreement, who is currently employed on a situation [full-time employment], will be laid off directly as a result of the introduction of new equipment that performs the work functions described in subsection (l) of this Article I.

Respondent's ''best offer'' was rejected. Thereafter, Respondent declared impasse and, on February 19, 1990, Respondent unilaterally implemented its last contract proposal.

Respondent contends that its proposal to the Union was not an attempt to bargain over a change in the bargaining unit but rather a proposal concerning work assignment and the right to transfer work out of the unit. Respondent's production department is responsible for the physical production of the newspaper, including composition, camera, plate-making, and the presses. As of February 19, 38 persons worked in the production department, 8 to 10 of whom were involved in the preparation of display advertising. The production department employees all work in a defined physical area in the Palmdale building. All the bargaining unit employees work in this area.

Respondent also employs 42 employees at its Lancaster facility, 12 miles away. The Lancaster employees are involved in preparation of advertising and editorial copy. However, the composition and printing of the paper is performed in Palmdale. There are no bargaining unit employees at the Lancaster facility.

The circulation of the newspaper and its advertising has increased substantially in the past 10 years. Respondent has introduced new equipment to meet the demands of this expanded business. Respondent has made considerable investments in new composing room and printing equipment. Included in its new equipment are McIntosh computers which facilitate the preparation of display advertising. It is the introduction of these McIntosh computers which motivated Respondent to make the proposals at issue herein.

Respondent did not use McIntosh computers to produce advertisements to be printed in its newspaper until after it

[2] The expired contract listed several exceptions to the exclusive jurisdiction of the Union including provisions which obligated the unit employees to accept and process certain advertising, editorial, and wire copy prepared for processing on VDTs outside of the composing room.

implemented its ''best offer.''[3] Since it implemented its final proposal, Respondent has used its McIntosh computers to prepare and electronically markup display advertisements. As a result of this new method, some of the work previously performed by bargaining unit employees at Palmdale is performed by nonunit employees at Lancaster. Further, some work previously performed by bargaining unit employees is being performed by employees in the creative services department (nonunit employees) in Palmdale. Respondent offered evidence that these changes reduce errors and are more cost effective. As indicated earlier, the Union does not oppose these changes but rather seeks to have all such work performed by unit employees.

The number of full-time employees working in the bargaining unit was the same as of the date of the instant hearing as on the date of the implementation of Respondent's ''best offer.'' No bargaining unit employees have lost their jobs because of the purchase of this new equipment or the implementation of Respondent's final offer.

Respondent further contends that the Board lacks authority to compel bargaining because the unit includes statutory supervisors and, therefore, the unit is inappropriate. As of February 12, the date of Respondent's final proposal, the bargaining unit included five statutory supervisors. The parties stipulated that the assistant day foreman, assistant night foreman, pressroom foreman, assistant pressroom foreman, and maintenance foreman were statutory supervisors. These five supervisors had been treated as employees and part of the bargaining unit under the 1987 agreement. Respondent had not sought to exclude these supervisors from the unit during the negotiations.

Analysis and Conclusions

In *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958), the Supreme Court held that insistence to impasse is available to a party only with respect to a mandatory subject of bargaining. Insistence to impasse on a permissive subject of bargaining violates the statutory duty in bargain in good faith. It is not the Board's role to sit in judgment of the substantive terms of bargaining, but rather to oversee the process to ascertain that the parties are making a sincere effort to reach agreement. *Res-Care, Inc*., 274 NLRB 1 (1985); *Reichhold Chemicals*, 277 NLRB 639 (1985) (*Reichhold I*); *Reichhold Chemicals* , 288 NLRB 556 (1988) (*Reichhold II).*

A unit description clause agreed to by a union and employer sets forth the scope of membership in the bargaining unit and is a permissive subject of bargaining. *Delhi-Taylor Refining*, 167 NLRB 115 (1967), enfd. 415 F.2d 440 (5th Cir. 1969), cert. denied 397 U.S. 916 (1970); *Newspaper Printing Corp*., 232 NLRB 291 (1977), enfd. 625 F.2d 956 (10th Cir. 1980), cert. denied 450 U.S. 911 (1981); *Newspaper Printing Corp*., 250 NLRB 1144 (1980), enf. denied 692 F.2d 615 (6th Cir. 1982). Consequently, an employer violates Section 8(a)(5) by refusing to include a unit jurisdiction clause in a collective-bargaining agreement or by bargaining to impasse over the modification of the scope of a prior unit jurisdiction clause. See, e.g., *Columbia Tribune Publishing Co*., 201 NLRB 538 (1983), enfd. 495 F.2d 1384 (8th Cir. 1974); *Delhi-Taylor Refining*, supra. The rationale for this limitation on bargaining over the scope of the unit is twofold: First, a union has the right to have its jurisdiction recognized in the collective-bargaining agreement. See, e.g., *Columbia Tribune Publishing Co*., supra, 201 NLRB at 551. Second, having a defined unit is a prerequisite to bargaining over terms and conditions of employment. Parties cannot bargain meaningfully unless they know which employees a union represents. Thus, limitations on bargaining over the scope of a unit serve as a means of facilitating the negotiation process. See, e.g., *Douds v. Longshoremen ILA*, 241 F.2d 278 (2d Cir. 1957); *Shell Oil Co*., 194 NLRB 988, 995 (1972).

However, the issue of the scope of a unit-jurisdiction clause is distinguishable from the issue of the employer's right to transfer work out of a unit, which is a mandatory subject of bargaining. See, e.g., *Newspaper Printing Corp*., supra, 232 NLRB 291; *Newspaper Printing Corp*., supra, 692 F.2d at 619. Thus, the Board recognizes a distinction between bargaining over the type of work which defines a unit and bargaining over the amount of such work which the unit will actually perform.

In the instant case, the bargaining unit is defined in terms of work and, thus, the question becomes difficult because any proposal relating to work assignments affects the scope of the bargaining unit.

In *Columbia Tribune Publishing Co*., supra, 201 NLRB 538, the Board held that a union is entitled to have a description of the appropriate unit it represents incorporated into any contract reached by the parties. In that case the respondent had refused to include the traditional unit-jurisdiction clause of its prior contracts. The Board rejected the respondent-employer's defenses that it needed flexibility due to technological changes and that jurisdiction and unit definition were combined in one clause.

In *Newspaper Printing Corp*., supra, 232 NLRB 291, the employer had insisted to impasse on modifying the existing unit-jurisdiction clause, which defined the appropriate unit in terms of ''all composing room work'' to provide that the unit include ''only those employees engaged in all work which the employer may from time to time designate to be performed in the composing room.'' The Board found that this unit-jurisdiction proposal gave the respondent-employer unilateral control over the scope of the unit and was, therefore, tantamount to a refusal to include a unit description. The Board further found that even if the proposed unit-jurisdiction clause did not contain this fatal flaw because the definition of an existing appropriate unit is not a mandatory subject of bargaining, the employer could not lawfully insist to impasse on a modification of the existing clause.

In *Standard Register Co*., 288 NLRB 1409 (1988), the employer-respondent insisted to impasse on its proposed jurisdiction clause to be included in a new contract in place of the unit-jurisdiction clause of the expired bargaining agreement. The jurisdiction proposal at issue read, ''the jurisdiction of the union is defined as the work assigned by the employer to the composing and markup and proof reading departments.'' The previous unit-jurisdiction clause defined jurisdiction and the unit as ''including all composing room work.'' The Board found that the parties reached impasse over the unit description and not work jurisdiction alone. The

[3] Some sample advertisements were created using the McIntosh computers prior to February 1990. However, these sample advertisements were retyped and marked up by unit employees, if used prior to February 1990.

Board found that the jurisdiction clause proposed by the employer by its terms modified the existing bargaining unit. Thus, the Board found that the employer's insistence to impasse on its jurisdiction clause was a refusal to bargain in good faith. The Board distinguished the Sixth Circuit's decision in *Newspaper Printing Corp. v. NLRB*, 692 F.2d 615 (6th Cir. 1982), in which the Sixth Circuit found that the respondent-employer's proposal had preserved the unit description in its impasse proposal while changing the work jurisdiction clause about which it had the right to bargain to impasse. The Board found that the Standard Register's proposal did not contain such saving language. Rather, the Board found that the Standard Register's proposal gave it ''the right to change unilaterally the scope of the unit itself.''

In *Storer Communications*, 295 NLRB 72 (1989), the employer proposed that the operation of certain work be removed from the exclusive jurisdiction of the union, that the exclusive jurisdiction of the union be limited to certain geographic areas, that members of another bargaining unit may be assigned to perform unit work, and that the employer have the right to use work produced by other bargaining units. However, there was no change in the recognition clause of the contract nor in the classifications of the employees covered by the agreement. The Board found that the changes proposed by the respondent employer concerned themselves with work jurisdiction and work assignments and did not involve a change in the scope of the bargaining unit. The Board found the changes did not involve *who* the union represented but rather what (work assignments) these employees would do.

Applying the above principles of law to the facts of this case, I find that Respondent sought to change work assignments rather than the scope of the bargaining unit. The facts establish that the real dispute between the parties concerned the work of computerized markup of advertising material. Work which was traditionally performed by bargaining unit employees with training in the printing trades could now be performed by nonunit employees with art, advertising, or sales backgrounds. Respondent's impasse proposal included the unit-jurisdiction language of the expired contract. Its proposal then sought to carve out work assignment exceptions to the jurisdictional aspect of the clause. The merits of Respondent's work assignments or the Union's counterproposals are not relevant to this discussion. The issue is whether Respondent could insist to impasse over its proposal.

Under *Storer Communications*, supra, I find that Respondent could lawfully insist to impasse on such exceptions to the union's exclusive right to perform the work at issue and the right to assign such work to nonunit employees. As pointed out in the *Storer Communications* case, for all practical purposes this is the same as subcontracting and subcontracting is held to be a mandatory subject of bargaining and not a change in the scope of the unit. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

I find no merit to General Counsel's argument that where the unit description and work jurisdiction clauses are merged, the employer may not bargain to impasse over jurisdiction. The cases show that unit description and work jurisdiction remain separate issues—one is a mandatory subject of bargaining and one is permissive. If a party insists to impasse on work jurisdiction only, as in *Storer Communications*, no violation will be found. By agreeing to a single clause defining the unit and jurisdiction, neither party waives its right to bargain over work assignments or jurisdiction in the future.

The Union contends that Respondent's proposal granted it ''unfettered discretion'' to assign virtually all bargaining unit work to nonunit employees and, therefore, was tantamount to a refusal to include a unit description in the contract. First, I note that the Respondent proposed that no full-time employee would lose his job due to these changes. More important, as the *Storer Communications* case holds, an employer that does not propose to change the scope of the unit may propose to assign or subcontract the unit work to nonunit employees. Neither the union nor employer is obligated to making any concession. Under *Storer Communications*, an employer may insist to impasse on sole discretion in assignment of work, as opposed to the scope of the unit. I find that *Storer Communications* represents the current Board law. See also *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989), and *McClatchy Newspapers*, 299 NLRB 1045 (1990), in which the Board held that an employer could insist to impasse on sole discretion to grant merit pay increases, a mandatory subject of bargaining.

The Bargaining Unit Defenses

Respondent contends that it was relieved of its obligation to bargain because the unit was not appropriate for purposes of collective bargaining. Should the Board disagree with my conclusions regarding the impasse issue, and in order to avoid the delay of a remand, I treat Respondent's unit defenses. For the following reasons I find no merit to these defenses.

In *Arizona Electric Power Cooperative*, 250 NLRB 1132, 1133 (1980), the Board found that the employer had refused to bargain in good faith when, during midterm contract negotiations, it withdrew recognition and made unilateral changes alleging that it was exempt from liability because the unit included statutory supervisors. There, as in the instant case, the employer had voluntarily included supervisors in the bargaining unit. The Board held that where supervisors had been voluntarily included in the unit, upon certification or voluntary recognition, it would not permit the employer to flout its obligation to bargain in good faith with the union. The Board explained that the employer's obligation to bargain concerning the supervisor would terminate on the expiration of the contract, provided that the employer took appropriate steps at that time to contest their continued inclusion in the unit. In *New York Times Co.*, 270 NLRB 1267 (1984), the employer argued that a 1500-person unit was inappropriate because it included 30 guards. The guards had been voluntarily included in the unit for approximately 40 years. The Board held that an appropriate unit may include a voluntarily agreed-on unit which could not be certified by the Board. The Board held that to sanction the employer's inappropriate unit defense would give the employer license to violate Section 8(a)(5) with impunity.

I find the *Arizona Electric Power* case controlling here. Respondent never sought to exclude the supervisors from the unit by way of a unit clarification or through the bargaining. The inclusion of the supervisors was only raised here as a defense to the allegation that Respondent unilaterally changed the scope of the bargaining unit. To endorse that defense would give Respondent license to violate Section 8(a)(5). Respondent could defend any refusal to bargain in

good faith by simply raising the unit question. Here there is no existing contract so Respondent may seek exclusion of the supervisors but the prior inclusion of the supervisors is no defense to an 8(a)(5) violation.

I further find no merit in Respondent's defense that the Union's proposal on unit jurisdiction would change the scope of the unit by adding employees from the Lancaster facility. The Union's position was simply to retain the unit description from the expired agreement and to retain the work even after new computers were utilized. There was no attempt by the Union to enlarge or change the bargaining unit.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to establish by a preponderance of the evidence that Respondent violated Section 8(a)(5) and (1) of the Act, as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The complaint is dismissed in its entirety.

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[4] All motions inconsistent with this recommended Order are hereby denied.

If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.